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Supreme Court, U.S.
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No. 01-1094

IN THE

Supreme Court of the United States

WILLIAM CAPACCHIONE, MICHAEL GRANT, *et al.*,
Petitioners,

TERRY BELK, *et al.*,
Respondents,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that, where intervenors in the late stages of a desegregation case obtained no relief under 42 U.S.C. § 1983 on their meritless claim that the School Board's good faith remedial efforts pursuant to ongoing court orders were unconstitutional, those intervenors were not entitled to attorney's fees under 42 U.S.C. § 1988 based solely on a determination that the School Board had achieved unitary status.

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BRIEF IN OPPOSITION OF RESPONDENTS CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*

Respondents Charlotte-Mecklenburg Board of Education, *et al.* (the "School Board" or "CMS") hereby oppose the petition for a writ of certiorari filed in this case by William Capacchione and Michael Grant, *et al.* (collectively, "petitioners"). Petitioners seek review of the decision of the *en banc* United States Court of Appeals for the Fourth Circuit denying them attorney's fees. While the *en banc* Fourth Circuit determined that the School Board had achieved unitary status, it correctly found no basis for a fee award under 42 U.S.C. § 1988 because petitioners had failed to prove their claims under 42 U.S.C. § 1983 that the School

Board's efforts to implement the desegregation orders approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), violated the Fourteenth Amendment.

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* Sup. Ct. R. 10. It implicates no conflict among the circuits and raises no important question of federal law. To the contrary, this case involves the application of settled legal principles to an unusual, fact-specific situation.

In a misguided attempt to transform this ordinary application of established rules into a case worthy of this Court's review, petitioners present questions that are not actually implicated by this case. They seek to create these issues by repeatedly misrepresenting the decision of the *en banc* Fourth Circuit.

Despite petitioners' effort to manufacture such issues, this case involves a straightforward application of firmly established principles. And, far from constituting a recurring question of national importance, the issue here is unique. Rarely has a school district simultaneously faced opposing claims that its good faith remedial efforts were both unconstitutionally excessive and unconstitutionally inadequate. Never has an intervenor in the late stages of a desegregation case, who unsuccessfully challenged the constitutionality of a school district's actions pursuant to court order, been awarded attorney's fees merely because the school system was found to have achieved unitary status. The petition therefore should be denied.

COUNTERSTATEMENT

A. The Original *Swann* Litigation

This case began in 1965, when African-American students established that CMS was required to dismantle its racially

segregated school system. *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 243 F. Supp. 667 (W.D.N.C. 1965), *aff'd*, 369 F.2d 29 (4th Cir. 1966). Litigation concerning an appropriate remedy for that segregation lasted ten years and included this Court's landmark decision in 1971. *See Swann*, 402 U.S. 1.

As a result, CMS operated under explicit court orders to desegregate. The extensive remedial orders in *Swann* required among other things "[t]hat no school be operated with an all-black or predominantly black student body" and "[t]hat pupils of all grades be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 268 (W.D.N.C. 1970). In addition, the orders required CMS to implement assignment procedures for its "optional" or magnet schools that would racially balance those schools without significantly resegregating other schools. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 379 F. Supp. 1102, 1103-08 (W.D.N.C. 1974).

The district court put the case on inactive status in 1975 but left its various desegregation orders in effect and did not terminate its jurisdiction. In 1979, in a separate lawsuit unsuccessfully challenging the constitutionality of the School Board's remedial efforts, the same district court judge found that CMS was failing to meet fully its remedial obligations under the ongoing *Swann* orders. *See Martin* v. *Charlotte-Mecklenburg Bd. of Educ.*, 475 F. Supp. 1318 (W.D.N.C. 1979), *aff'd on other grounds*, 626 F.2d 1165 (4th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

B. The *Capacchione* Lawsuit

While petitioners falsely claim that they "did not choose to litigate, CMS did," Pet. 21, it was, in fact, Capacchione and

the Grant intervenors and, on the other hand, the original *Swann* plaintiffs who all sued the School Board.

The most recent phase of this litigation began in 1997. William Capacchione brought a new lawsuit, under 42 U.S.C. § 1983, on behalf of his daughter, who had not been admitted to a magnet school to which she had applied. Capacchione alleged that CMS' magnet school admissions practices were unconstitutional, despite the fact that they were implemented to comply with the *Swann* orders.

The district court subsequently allowed the intervention of some additional parents, Michael Grant, *et al.* (collectively, "the Grant intervenors"), who for various reasons did not like the schools to which their children were assigned pursuant to the School Board's desegregation plan. *See* May 20, 1998 Order at 3, 11. Like Capacchione, they alleged that CMS' efforts to comply with the court's desegregation orders were unconstitutional. The Grant intervenors also claimed that they should be allowed to intervene because "their interests [were] not adequately protected by the Defendant Board." Grant Reply Brief re Motion to Intervene (filed May 18, 1998). Both the Grant intervenors and Capacchione sought damages as well as declaratory and injunctive relief.

While Capacchione and the Grant intervenors claimed that the School Board had done too much, or gone too far, to comply with the *Swann* orders, the original plaintiff class vigorously argued that CMS had done far too little. They argued that the School Board's remedial efforts not only were mandated by the *Swann* orders, but also had been insufficient to comply fully with those orders.

Respondents Terry Belk, *et al.* (collectively "the Belk respondents") thus moved to restore *Swann* to the active docket and to consolidate *Capacchione* and *Swann*. The School Board, however, already had filed a motion to dismiss, arguing that the "program under attack in [*Capac-*

chione] was developed as a direct result of and in response to the Board of Education's duties to fulfill [the] continuing orders under *Swann*." Motion to Dismiss at 2 (filed Oct. 22, 1997). Because those orders unquestionably still were in effect, the School Board did not agree that "*Swann* need[ed] to be restored to the active docket" in order to dispose of Capacchione's claims. Response to Motion to Restore Case to Active Docket at 7 (filed Oct. 30, 1997). While CMS' argument on the merits of both Capacchione's § 1983 claim, and those of the Grant intervenors, was ultimately accepted by the *en banc* Court of Appeals, *see* Pet. App. 4a, 74a-75a, 114a-135a, 156a-160a,[1] the district court denied the School Board's motion to dismiss. March 6, 1998 Order. The district court also granted the Belk respondents' motion, reactivated *Swann*, and consolidated it with *Capacchione*. *Id.* at 4.

The district court directed the parties in the consolidated cases to address "whether the Charlotte-Mecklenburg school district is unitary." *Id.* at 3. The School Board then did an extensive self-evaluation and concluded that persistent racial inequities in CMS were in part the result of its historical failure to comply fully with the court's orders in *Swann* and that practicable measures were available to meet the requirements of those outstanding orders. Therefore, the School Board concluded that it was not yet unitary and formulated a remedial plan to become unitary as quickly as possible.

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[1] For the Court's convenience, where the appendix accurately reprints the decisions below, we cite to the appendix to the petition. However, without purporting to have identified them all, we note that the appendix contains many errors. The opinions of the *en banc* Court of Appeals, for example, are not reprinted in the correct order. In addition, Chief Judge Wilkinson's opinion does not contain any reference to an "Exhibit C," as is indicated on page 162a of the appendix. Likewise, Judge Luttig did not concur in the opinion by Judge Widener, as that same page incorrectly states. The reference to a "concurby" (*sic*) Judges Wilkinson, Widener and Luttig on page 145a also is erroneous.

Far from intending to "indefinitely perpetuate" race-based student assignment plans, as petitioners falsely claim throughout their petition, *see* Pet. 17; *see also id.* at 4 n.4, 11-12, well before trial, the School Board provided in its proposed remedial plan that it would *not* consider race in student assignment once it became unitary. *See* Pet. App. 93a (citing "Charlotte-Mecklenburg Schools' Remedial Plan to Address the Remaining Vestiges of Segregation"); CMS Brief on Appeal at 26 (filed May 19, 2000).

C. The District Court Proceedings

In August of 1998, before the hearing on the merits of the competing claims about CMS' remedial efforts—that they had been unconstitutionally excessive or unconstitutionally inadequate—Capacchione and his family moved to California. All of his claims for declaratory and injunctive relief (in both his case and the *Swann/Belk* case) were therefore dismissed with prejudice. *See* December 22, 1998 Order at 7-8. The district court nevertheless refused to dismiss Capacchione's claim for damages—even though it was uncontested that his daughter's magnet lottery number was so high that she would not have been admitted regardless of race.

The district court conducted a hearing in the spring of 1999. While petitioners now assert with no support that "thousands of students" were denied the "opportunity to fully participate" in their schools' activities, Pet. 5, they were unable to show any tangible harm to any child caused by the actions of the School Board. As a result, at the close of their case, the district court granted CMS' motion for partial judgment as to all of petitioners' claims for actual damages. Pet. App. 281a (citing May 28, 1999 Order). At this point, Capacchione's only remaining claim was for nominal damages, while the Grant intervenors continued also to seek declaratory and injunctive relief.

The Belk respondents then presented their case that CMS had failed to comply with the *Swann* orders and thus was not yet unitary. Lastly, the School Board presented its case, establishing that it had implemented its magnet program in a good faith effort to comply with the court orders, but also indicating its honest belief that it had not done everything practicable in the past to comply fully with all of the *Swann* orders.

The district court agreed "[w]ithout reservation" that the School Board had acted in good faith, Pet. App. 268a, and also found that CMS had achieved unitary status. *Id.* at 272a. The court, therefore, dissolved the prior *Swann* orders. *Id.* The district court did not find, as petitioners misleadingly suggest throughout their petition, that the School Board had "colluded" in some way with the original plaintiffs. Pet. 4 n.4, 11-12, 17, 21. Instead, the district court expressly found that, in implementing its magnet program, CMS "was acting to further a compelling governmental interest, i.e., remedying the effects of past racial discrimination." Pet. App. 278a.

Nevertheless, applying strict scrutiny to the School Board's prior operation of magnet schools as part of its efforts to comply with the *Swann* orders while they were still in effect, the district court found that CMS' magnet admissions procedures were not "properly tailored" to the goal of remedying discrimination. *Id.* at 281a.

The district court, however, did not find that the School Board was threatening to use race in an unconstitutional manner in the future, as petitioners misleadingly suggest, *see* Pet. 4 n.4. The court nonetheless entered a sweeping injunction prohibiting CMS from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." Pet. App. 287a. The court also awarded nominal damages ($1.00 in total) to petitioners. *Id.* at 281a. Finally, the court found the

petitioners to be prevailing parties, *id.* at 285a, and subsequently ordered the School Board to pay them attorney's fees and costs in the amount of $1,499,016.47, plus post-judgment interest. Pet. App. 137a (citing *Capacchione* v. *Charlotte-Mecklenburg Schs.*, 80 F. Supp. 2d 557, 568-569 (W.D.N.C. 1999), and March 6, 2000 Order).

D. The Proceedings on Appeal

While petitioners falsely claim that "no party ever briefed" the issue of attorney's fees for work on unitary status in the Fourth Circuit, Pet. 4 n.4, the issue was briefed and rebriefed and exhaustively considered and reconsidered by the *en banc* Court of Appeals.

1. The Panel Decision

The School Board and the class of African-American school children both appealed the district court's decision. The Belk respondents focused on the question of whether the district court had properly found that CMS was unitary.

The School Board raised this issue as well but focused its briefing and argument on the unprecedented injunction, damage award, and attorney's fee award of the district court. The School Board argued that the district court erred (1) in finding CMS' magnet school practices unconstitutional and awarding damages based on this purported violation; (2) in issuing a broad prospective injunction when there was no threat of future unlawful action; and (3) in finding petitioners to be prevailing parties and awarding them attorney's fees, expert fees and costs. *See* CMS Brief on Appeal at 18-23, 28-33, 38-40.

On appeal, CMS did not, as petitioners incorrectly claim, "concede[ ] that the Grant petitioners were entitled to an award of attorneys' fees if the district court's unitary status declaration was upheld." Pet. 4. The School Board broadly appealed the district court's finding that petitioners were

prevailing parties entitled to attorney's fees under 42 U.S.C. § 1988. CMS Brief on Appeal at 38. CMS argued that "[b]ecause [petitioners] either did not or * * * should not prevail on their claims, they are not entitled to an award of attorney['s] fees." *Id.* The School Board focused its briefing in the Court of Appeals on arguments regarding why Capacchione in particular was not entitled to the $716,123.49 in attorney's fees awarded to him by the district court, *see* 80 F. Supp. 2d at 565, 568, because those fees were most obviously inappropriate: Before trial even began, Capacchione had been dismissed from the case for all purposes, except pursuit of his ultimately futile claim for nominal damages. CMS Brief on Appeal at 38-40.[2]

The original panel of the Fourth Circuit agreed with the School Board's arguments on the three issues noted above and agreed in part with the Belk respondents. While the panel would have affirmed some of the district court's conclusions with respect to unitary status and vacated and remanded others, it also found that (1) CMS had not violated the Constitution in its good faith efforts to implement the *Swann* orders; (2) no proper basis existed for a prospective injunction; and (3) petitioners were not entitled to attorney's fees. *See Belk* v. *Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000).[3]

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[2] Capacchione did not appeal the district court's dismissal of all of his claims for injunctive and declaratory relief, both "in his own case *and as an intervenor in* Swann," December 22, 1998 Order at 4 (emphasis added). His only possible basis for obtaining attorney's fees thus would have been to succeed on his sole surviving claim for nominal damages. The *en banc* Fourth Circuit ruled against him on that claim, Pet. App. 4a, and he does not now seek to contest that decision before this Court. Therefore, even if the petition were granted—which for the reasons elaborated below it should not be—Capacchione can make no argument that could possibly entitle him to attorney's fees at this stage of the litigation.

[3] Neither the majority of the panel, nor subsequently of the *en banc* Court of Appeals, found it necessary to reach the issue of

The panel vacated the district court's award of attorney's fees for two reasons. First, the award had been premised in large part on petitioners' "success in obtaining nominal damages and injunctive relief" and those judgments had been reversed. Second, a unitary status determination did not entitle petitioners to recover attorney's fees from the School Board. 233 F.3d at 278.

2. The Rehearing *En Banc*

Petitioners, who now brazenly claim that the *en banc* court "reached out" to decide the attorney's fees issue, Pet. 4 n.4, themselves explicitly raised that issue in their petition for rehearing *en banc*. Petition for Rehearing and Rehearing *En Banc* at 14 (filed Dec. 14, 2000). Petitioners specifically argued that the panel's denial of attorney's fees was "clear error." *Id.* Indeed, their basic arguments then were the same contentions that they repeat now in their petition. *See id.* at 14 n.12. The *en banc* Fourth Circuit fully and fairly considered those arguments and rejected them.

A majority of the *en banc* Court of Appeals agreed with the panel not only about the attorney's fee award, but also about most of the issues in the case. The *en banc* majority agreed that the School Board had done nothing unlawful in operating magnet schools in an effort to comply with the *Swann* orders and reversed the district court's ruling that CMS had violated the Constitution. Pet. App. 4a, 74a, 114a-135a, 156a-160a. And, unanimously, the *en banc* Court of Appeals vacated the district court's prospective injunction. *Id.* at 4a. The Fourth Circuit thus plainly did not, as petitioners falsely allege, order "CMS to end race-based student assignments by the next school year." Pet. 4. Rather, having concluded that

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whether the dismissal of all of Capacchione's claims for declaratory and injunctive relief in his case (and of *all* of his claims as an intervenor in *Swann*) independently barred an award of attorney's fees to him, *see supra* note 2, because both concluded that none of the petitioners was entitled to such an award.

CMS was unitary in all aspects of its operations, the Court of Appeals dissolved all prior injunctive orders and decrees and returned the School Board to full local control. Pet. App. 4a.

Finally, the *en banc* Court of Appeals simply did not find that the School Board had acted for "improper reasons" in mistakenly concluding that it was not yet unitary. Pet. 6 (quoting Pet. App. 63a (Traxler, J., dissenting)). Only two other judges, of eleven on the Fourth Circuit, joined this section of Judge Traxler's opinion, Pet. App. 3a (Wilkins, J. and Williams, J.), and no other judge of the Court of Appeals concluded that the School Board was not acting in good faith. Petitioners' claim that the majority "did not dispute" this point, Pet. 6, is demonstrably false: Four other judges concluded that the judgment of unitary status should be vacated in part and remanded and that the School Board's magnet practices were directly authorized by the *Swann* orders, Pet. App. 114a, 135a (Motz, J., King, J., Michael J., and Gregory, J.); two more, including Chief Judge Wilkinson, similarly concluded they could not "hold the Board liable for its attempts to implement the very policies, and attain the very ends, which the courts had ordered it to do," *id.* at 160a (Wilkinson, C.J. and Niemeyer, J.); and two more, even though they dissented on the attorney's fee issue, *id.* at 4a, did not join this portion of Judge Traxler's opinion. *Id.* at 3a (Widener, J. and Luttig, J.).

3. The Denial of Reconsideration

Capacchione and the Grant intervenors filed separate motions in the Fourth Circuit asking the Court of Appeals to "reconsider" its *en banc* ruling on attorney's fees. The Grant intervenors argued that they should be entitled to attorney's fees based on the fact that the School Board had achieved unitary status. *See* Grant Motion to Reconsider at 7-18 (filed Oct. 5, 2001). Capacchione's motion also argued that he somehow was entitled to attorney's fees based upon the district court's declaratory judgment that CMS' magnet

practices, while it was under court order, violated the Constitution. *See* Capacchione Motion to Reconsider at 5-14 (filed Oct. 11, 2001).

The Court of Appeals, however, already had "extensively debated" the matter of attorney's fees in its *en banc* decision. Pet. App. 308a. The Fourth Circuit, therefore, denied both motions for reconsideration, with Chief Judge Wilkinson succinctly reiterating why the determination of unitary status did not justify an award of attorney's fees, *id.* at 308a-310a, and Judge Traxler filing a brief dissent. *Id.* at 310a-313a.

No judge of the Fourth Circuit even acknowledged Capacchione's unsupported claim that the district court's declaratory judgment with respect to the magnet plan had been affirmed. A majority of the *en banc* Court of Appeals plainly had already ruled that no constitutional violation occurred under the facts presented and therefore had vacated that declaration. *Id.* at 4a, 74a-75a, 114a-135a, 156a-160a.

Having now had their claims for attorney's fees considered and rejected by the original Fourth Circuit panel, by the *en banc* Court of Appeals on rehearing, and then again by the *en banc* Court on two "motions to reconsider," petitioners seek yet further review in this Court.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S ACTUAL DECISION DOES NOT IMPLICATE EITHER QUESTION IDENTIFIED IN THE PETITION

Neither of petitioners' questions presented is actually implicated in this case. In an attempt to manufacture an issue worthy of certiorari, petitioners misrepresent both the facts and the decision of the *en banc* Fourth Circuit.

In framing their first question (and repeatedly throughout their petition), petitioners falsely claim that they obtained "an order requiring the termination of race-based student assign-

ment by a date certain." Pet. i.[4] The Fourth Circuit issued no such order. To the contrary, the *en banc* Court of Appeals unanimously reversed a district court injunction to this effect. Pet. App. 4a ("by a unanimous vote, the injunction is vacated"). Because the School Board neither had acted unlawfully in the past nor imminently threatened illegal action in the future, there was neither a need nor a proper basis for an injunction. The Fourth Circuit did not find that the "school system [was] deliberately avoiding a declaration of unitary status," as petitioners wrongly assert. Pet. 3 n.3. As a result, when the *en banc* Fourth Circuit affirmed the unitary status determination, it merely vacated the *Swann* orders and returned CMS to local control, directing that the School Board operate the school system "without the strictures of these decrees." Pet. App. 4a. As a result, "CMS is now free to take whatever action it wishes consistent with the Constitution." Pet. App. 141a (Motz & King, JJ.); *see also id.* at 100a (Wilkinson, C.J.).[5]

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[4] Petitioners' persistent repetition of this patently false assertion cannot make it true. *See id.* at 4 ("the Fourth Circuit * * * ordered CMS to end race-based student assignments by the next school year"); *id.* at 5 (petitioners "secured * * * an order barring CMS from continuing to assign school children to schools based on race"); *id.* at 9 (majority reinstated "the District Court's order that CMS terminate its race based student assignment plan").

[5] While the School Board now is implementing the type of race-neutral student assignment plan that it previously had envisioned using once it became unitary, this course was not mandated by the *en banc* Fourth Circuit's unitary status determination. Even the dissenters on the issue of attorney's fees acknowledged the possibility that CMS could have adopted a race-conscious student assignment plan for 2002-2003 if it was "narrowly tailored to serve a compelling governmental interest." Pet. App. 311a (Traxler, J., dissenting). In other cases, the Fourth Circuit has expressly declined to hold that race may never be a factor in student assignment decisions made by unitary school systems. *See Eisenberg* v. *Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999) (assuming without deciding that a non-remedial interest may be compelling), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle* v. *Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (noting that

The second question that petitioners falsely claim is presented by this case relies on a similar misrepresentation of the Fourth Circuit's actual decision. Petitioners incorrectly state that they obtained "a declaratory judgment holding the school system's use of racial quotas in its magnet school program unconstitutional." Pet. i.[6] A majority of the Court of Appeals plainly rejected that proposition and also reversed the district court's "finding of liability" for the operation of magnet schools. Pet. App. 4a. As Judge Traxler noted in dissent, the majority "*reverse*[*d*] the district court's holding that CMS'[] magnet schools program, which was implemented in 1992, was an ultra vires, unconstitutional act." *Id.* at 6a (emphasis added); *see also id.* at 74a (Motz & King, JJ.) ("[a] majority of the Court today reverses the district court's finding that the * * * magnet schools program violated the * * * Constitution").

Even more egregiously, petitioners claim that "the majority expressly agreed with Petitioners that CMS was intentionally racially discriminating against its students in furtherance of its 'racial diversity' agenda." Pet. 18. No judge of the Court

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whether promoting the educational benefits of diversity is a compelling interest "remains unresolved"), *cert. dismissed*, 529 U.S. 1050 (2000).

[6] Petitioners again attempt in vain to bolster their false claim by force of mere repetition. *See* Pet. 3 ("Petitioners prevailed on both counts," including their request for "a declaration that the strict racial quotas used to govern admission of students to coveted magnet schools were unconstitutional"); *id.* at 22 ("Petitioners' Attainment of a Declaratory Judgment that the Magnet School Admission Program Was Unconstitutional"); *id.* ("Petitioners prevailed, in part, on their claim that the magnet school admissions program is unconstitutional"); *id.* at 23 ("declaration of unconstitutionality [of the magnet school program was] in substance, affirmed by a majority of Judges of the *en banc* court"); *id.* at 25 ("On appeal, the majority of the *en banc* Fourth Circuit agreed, in substance, that the magnet program violated the Equal Protection Clause").

of Appeals or the district court ever made any such finding of intentional discrimination.

Petitioners futilely attempt to resuscitate the district court's ruling that CMS' operation of magnet schools was unlawful—plainly reversed by the Court of Appeals—with a tortured reading of the opinions below. Petitioners mistakenly equate Chief Judge Wilkinson's dictum that the magnet school program would be unconstitutional if "adopted today" by a unitary CMS with the far different conclusion that it was unconstitutional when implemented pursuant to binding desegregation court orders. *See id.* at 25 n.12. Petitioners simply ignore the fact that there are obvious material differences between a school district with remedial obligations under ongoing desegregation orders, and a unitary school system without either such duties or a compelling interest in remedying past discrimination. *See, e.g.*, Pet. App. 133a-134a. With respect to CMS' actions while it was under court order, Chief Judge Wilkinson expressly concluded that "the district court's desegregation orders in this case can fairly be read to encourage, rather than foreclose, the conduct in which the school board here engaged." *Id.* at 158a; *see also id.* at 74a (Motz & King, JJ.).

Moreover, in their motion to reconsider in the Fourth Circuit, petitioners unsuccessfully asked the Court of Appeals itself to accept this same twisted reading of its decision. Capacchione argued that a majority of the *en banc* Court somehow had found the School Board's magnet school practices unconstitutional. *See* Capacchione Motion to Reconsider at 5-14. The Fourth Circuit, however, rejected that argument and denied the motion. Pet. App. 308a.

Petitioners also repeatedly make the incredible claim that the School Board did not challenge the district court's holding that the magnet program was unconstitutional but only challenged the award of damages and attorney's fees on this issue based on immunity. Pet. 25-26 ("the court's

holding was mandatorily restricted in this regard because the only point of error and argument advanced by CMS was an immunity from actual damages").[7] This blatant misrepresentation has no validity at all: The School Board's principal argument on the magnet issue, to which it devoted an entire section of its Fourth Circuit brief, was that the "operation of magnet schools was a lawful means of complying with desegregation court orders." *See* CMS Brief on Appeal at 18-22. The Fourth Circuit accepted this argument.

Even if the Court of Appeals had based its decision solely on "immunity" rather than the absence of a constitutional violation—and it did not—such a ruling still would not have justified an award of attorney's fees. As this Court has stated, "a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party." *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992). Petitioners obtained no such judgment. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, *either because of legal immunity* or on the merits, § 1988 does not authorize a fee award against that defendant." *Id.* at 109 (emphasis added) (internal quotation marks omitted).

In sum, neither of the questions ostensibly presented by the petition is really at issue in this case, and the petition therefore should be denied. Sup. Ct. R. 14.4 ("failure of a petitioner to present *with accuracy* * * * whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition" (emphasis added)).

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[7] *See also id.* at 23 ("immunity from *damages* was the only argument advanced by CMS on appeal"); *id.* at 24 ("On appeal, CMS argued merely that *damages* were not available for its good faith efforts to comply with the *Swann* orders").

II. THE FOURTH CIRCUIT'S RULING ON ATTORNEY'S FEES DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Court of Appeals Correctly Applied This Court's Precedents

Petitioners' insistent misrepresentations that the Fourth Circuit effectively affirmed the district court's overbroad injunction and somehow found the School Board to have acted illegally betray the weakness of any claim for attorney's fees based solely on the unitary status determination. Their persistent rhetoric to the contrary notwithstanding, petitioners simply did not prevail on their fundamental claim under 42 U.S.C. § 1983 that their civil rights had been violated by the School Board's efforts to comply with the *Swann* orders. As a result, the Fourth Circuit's denial of attorney's fees is based on its straightforward application of settled legal principles.

First, as Chief Judge Wilkinson noted, it is the settled American rule that, absent statutory authority to the contrary, each party bears its own attorney's fees. Pet. App. 162a.

Second, the only statutory authority upon which petitioners seek to rely is 42 U.S.C. § 1988, which allows a court in an action "to enforce a provision of section[ ] * * * 1983, * * * in its discretion, [to] allow the prevailing party * * * a reasonable attorney's fee." Here, petitioners' § 1983 claims were all premised on alleged constitutional violations in the implementation of court-ordered desegregation remedies, but the Court of Appeals found that no such violation had occurred. Indeed, "no member of the Court suggest[ed] that [in attaining unitary status], or in not doing so sooner, CMS violated 42 U.S.C. §§ 1981, 1983, 2000d, the Fourteenth Amendment of the Constitution, or any other law or constitutional provision." Pet. App. 138a (Motz & King, JJ.); *see also id.* at 160a (Wilkinson, C.J.). The Fourth Circuit thus reversed the declaratory judgment, injunctive relief and

nominal damages awarded by the district court under § 1983. *A fortiori*, it properly reversed the award of attorney's fees under § 1988 as well.[8]

Third, not only did petitioners fail to establish a new constitutional violation by the School Board, but also the *en banc* Fourth Circuit's conclusion that CMS already had cured an old constitutional violation does not support an attorney's fee award. As Chief Judge Wilkinson explained, there is no statutory basis for imposing attorney's fees "on a party [CMS] whose actions have been adjudged compliant with federal statutes and our Constitution." Pet. App. 309a. Certainly, 42 U.S.C. § 1988 does not authorize such an award, because "a unitary status determination" that prior constitutional violations have been remedied to the extent practicable is "the exact opposite" of a finding of liability under § 1983. *Id.*[9] As Capacchione acknowledged when he

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[8] Petitioners' remarkable claim that the Fourth Circuit based its decision to deny attorney's fees on "concern over the size of the award rather than law" is completely unsupported. Pet. 21. Petitioners rely only upon a blatant distortion of Chief Judge Wilkinson's concurring opinion with respect to the denial of their motions for reconsideration (which they also incorrectly ascribe to Judge Niemeyer as well) in support of this baseless allegation. However, the Chief Judge, both in that opinion and in his initial opinion, quite explicitly grounded his reasoning on the absence of a statutory basis for attorney's fees. *See* Pet. App. 162a, 310a. Moreover, at the end of the paragraph from which petitioners selectively quote, Chief Judge Wilkinson clearly explains that his discussion of the questions of equity and policy are intended simply to "underscore the inadvisability of courts debating the pros and cons of fee shifting in the absence of a congressional declaration." *Id.* at 310a.

[9] The Court of Appeals also relied on an independent ground for denying fees in this case: Even if § 1988 applied—and it does not—petitioners were not "prevailing parties," because there was no "material alteration of the legal relationship" between CMS and the petitioners. Pet. App. 139a (Motz & King, JJ.) (citations omitted); *see also id.* at 160a (Wilkinson, C.J.). A judgment of unitary status imposes no legal obligation on a defendant school

sought to intervene in *Swann*, "[i]f the Court finds the schools are unitary, this will mean nothing more than that the * * * Defendants were successful in achieving the purposes of this Court's Orders and the Constitution." Capacchione Motion to Intervene at 8-9.

That the original *Swann* case itself was a § 1983 action cannot rescue petitioners' claim for fees as prevailing plaintiffs. In intervening in *Swann* and showing that the original civil rights violations in that case had been remedied by the School Board, petitioners did not act as plaintiffs but as defendants. Indeed, the Grant intervenors explicitly acknowledged this when they sought to intervene claiming that "their interests are not adequately protected by the Defendant Board." Grant Reply Brief re Motion to Intervene at 9. It is well-established, however, that prevailing *defendants* in § 1983 cases may only recover attorney's fees by demonstrating that the plaintiffs' claim was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978); *see also Hughes* v. *Rowe*, 449 U.S. 5, 14-16 (1980) (per curiam). Petitioners do not and cannot claim that they meet this standard for obtaining fees as prevailing defendants in a § 1983 action. Nor do they even allege that the argument that CMS was not yet unitary in 1999, accepted by four judges below, was "frivolous, unreasonable, or without foundation." Therefore, they cannot be entitled to fees as intervenors in *Swann*. *See, e.g.*, *United States* v. *Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991) (by "align[ing] itself with parties opposing the [original plaintiff's] efforts to show a civil rights violation," the successful intervenor "behaved as a defendant" and, therefore, was not entitled to recover attorney's fees absent satisfaction of the prevailing defendant standard).

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board toward any party, but rather simply returns the school system to local control. *Id.*

Finally, petitioners cite the School Board's voluntary modification of its magnet programs as a basis for considering them prevailing plaintiffs. *See* Pet. 16. This argument, however, is simply a thinly veiled version of the catalyst theory, which petitioners themselves disavow, *id.* at 8 (petitioners "never sought attorney's fees on the basis of the catalyst theory"), and which this Court has expressly disallowed. *See Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). The Fourth Circuit unanimously reversed the district court's injunction, leaving the School Board to operate free of the strictures of any court order. CMS' student assignment plan for 2002-2003, including its revised magnet school program, is the product of the voluntary decisions of elected local officials. It simply is not, as petitioners falsely claim, "involuntary change" or "court ordered relief." Pet. 16. And, as this Court held only last Term, "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Buckhannon*, 532 U.S. at 605.

The *en banc* Fourth Circuit correctly applied these basic § 1988 principles to this unusual, fact-specific dispute. The *en banc* Court's decision denying fees implicates no extraordinary issue warranting this Court's further review. At most, petitioners complain—incorrectly—that these "properly stated rule[s] of law" have been misapplied in these unique circumstances, but that is not grounds for certiorari under this Court's rules. Sup. Ct. R. 10.

B. There Is No Intercircuit Conflict

Given the foregoing, it is not surprising that there is no split in the circuits on the question of whether intervenors in the late stages of a desegregation case who fail to prove alleged constitutional violations are somehow entitled to attorney's fees based solely on a determination that the

defendant school system has achieved unitary status. Not only has no other court disagreed with the Fourth Circuit on the narrow attorney's fee issue actually presented in this case, but no other court (even at the district court level) has even addressed it.

While petitioners incorrectly claim that there is "relevant precedent holding a declaratory judgment of unitary status confers prevailing party status on the successful party under 42 U.S.C. § 1988," Pet. 10, neither they nor the dissent below cite such a case. Indeed, there is no reported case in which a party that intervened in the terminal stages of a long-running school desegregation case and failed to establish any constitutional or statutory violation was awarded attorney's fees. (CMS also is unaware of any unreported decision to this effect.)

The court of appeals decisions upon which petitioners do rely are inapposite. *See* Pet. 11-12. The controlling distinction, moreover, is not, as petitioners disingenuously suggest, the race of the party. *See id.*[10] Rather, the controlling fact is whether the party obtained relief under § 1983. In all of the appellate court cases cited by petitioners, the prevailing party established a constitutional violation and obtained injunctive relief as a result. *See Jenkins* v. *Missouri*, 127 F.3d 709, 716 (8th Cir. 1997) (fees awarded for partial success in preserving injunctive relief against challenge from defendant); *Mills* v. *Freeman*, 118 F.3d 727, 734 (11th Cir. 1997) (affirming fee award for plaintiffs' post-judgment monitoring of desegregation remedy); *Jenkins* v. *Missouri*, 967 F.2d 1248, 1251

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[10] The petitioners' outrageous allegation that Chief Judge Wilkinson found that the white intervenors do not have "equal dignity with black plaintiffs who prove a school district to be unitary" is frivolous at best. Pet. 14. While petitioners baselessly claim the Court of Appeals has created a "double standard" based on race, *id*, they cite no case in which a party of *any race* failed to establish a § 1983 violation or to obtain a § 1983 remedy and was awarded attorney's fees based only upon a unitary status determination.

(8th Cir. 1992) (fees awarded for defending injunctive relief against challenge from intervenor); *Gaines* v. *Dougherty County Bd. of Educ.*, 775 F.2d 1565, 1567-68 (11th Cir. 1985) (fees awarded for eighteen years of work establishing liability and obtaining comprehensive desegregation plan); *Northcross* v. *Board of Educ. of the Memphis City Schs.*, 611 F.2d 624, 628 (6th Cir. 1979) (fees awarded for obtaining "an effective, final order of desegregation"), *cert. denied*, 447 U.S. 911 (1980).[11] Moreover, none of these decisions even addresses a claim for attorney's fees premised on obtaining a unitary status determination.

Likewise, petitioners in correctly claim that "[d]istrict courts * * * have also concluded that parties who obtain orders or judgments declaring, or otherwise furthering the goal of achieving a unitary school system are prevailing parties." Pet. 12. Neither of the cases to which they cite, however, even involved a judgment declaring a school system unitary. Both *Vaughns* v. *Board of Education of Prince George's County*, 598 F. Supp. 1262 (D. Md. 1984), *aff'd*, 770 F.2d 1244 (4th Cir. 1985), and *Tasby* v. *Estes*, 416 F. Supp. 644 (N.D. Tex. 1976), involve the typical situation in which the original plaintiffs in a desegregation case receive an attorney's fee award because they have established liability and obtained a remedy. Neither ruling involves a unitary status determination at all, and certainly neither decision addresses the unique circumstance of an intervenor in the late stages of a desegregation case who fails to establish any violation of law, but seeks fees based solely on a unitary status determination.

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[11] Petitioners also attempt to compare themselves to plaintiffs who have played a role in bringing school systems "into compliance with" the Constitution, but this analogy also is inapt. *See* Pet. 13 n.7 (quoting *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 718 (1974), and *Tasby* v. *Estes*, 416 F. Supp. 644, 646 (N.D. Tex. 1976)). In those cases the plaintiffs, unlike the petitioners here, established a constitutional violation and obtained a remedy.

Finally, Petitioners also make the irrelevant argument that intervenors, like the original parties to a suit, may be "entitled to attorney['s] fee awards under § 1988." Pet. 13-14, 15 (citations omitted). Nothing in the decision below calls into question that truism. However, an intervenor, just like a plaintiff, must prevail on a § 1983 claim to obtain a fee award under § 1988. In all of the cases relied upon by petitioners, the intervenors did establish a violation or obtain a court-ordered remedy. In this case, the petitioners did not.[12] The Fourth Circuit's decision is fully consistent with rulings of other courts of appeals on this issue as well.

This case thus presents no disagreement among the lower federal courts for this Court to resolve, and the petition should be denied.

III. THIS NARROW DISPUTE INVOLVES NO RECURRING ISSUE OF NATIONAL IMPORTANCE

This case involves an isolated, unrepeated dispute in a unique context. The *en banc* Fourth Circuit meticulously considered this highly unusual situation in which the School Board was caught between diametrically opposite claims. On the one hand, petitioners claimed unsuccessfully that the School Board's remedial efforts had been unconstitutionally excessive. On the other hand, the Belk respondents claimed unsuccessfully that the School Board's remedial efforts were unconstitutionally inadequate. CMS' unique dilemma is not likely to recur.

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[12] In the only school desegregation case that petitioners cite with respect to this argument, for example, the intervenors obtained both a "preliminary injunction" and a finding that the defendant's proposed remedy "constituted a violation" of a court-approved consent decree, and they also shaped the remedy ultimately ordered by the court. *United States* v. *Board of Educ. of Waterbury*, 605 F.2d 573, 574-576 (2d Cir. 1979). Here, the injunction entered by the district court was vacated, no violation was found, and no remedy was ordered.

Petitioners argue that this Court should grant certiorari to "ensure that desegregation decrees are temporary," Pet. 17, but this argument neither provides a legitimate basis for reviewing the attorney's fee decision below nor addresses any actual need. Even if such a policy intervention were necessary, this Court only recently has underscored that the judiciary enjoys no " 'roving authority' " to award counsel fees " 'whenever the courts might deem them warranted.' " *Buckhannon*, 532 U.S. at 610 (quoting *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975)).

There also is no need to encourage new lawsuits against locally elected school boards in order to push them more rapidly to unitary status. Since this Court's decision in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), district courts exercising their supervisory authority have initiated unitary status proceedings in no fewer than five published decisions.[13] Moreover, since *Dowell*, in at least twenty-two other cases of which CMS is aware, school districts have themselves sought, and obtained, declarations of unitary status.[14] School boards

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[13] *See Lee* v. *Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992); *Lee* v. *Butler County Bd. of Educ.*, 2002 WL 199731, --- F. Supp. 2d --- (M.D. Ala. Feb. 5, 2002); *Manning* v. *School Bd. of Hillsborough County*, 24 F. Supp. 2d 1277 (M.D. Fla.), *clarified by* 28 F. Supp. 2d 1353 (M.D. Fla. 1998), *rev'd*, 244 F.3d 927 (11th Cir.), *cert. denied*, 122 S. Ct. 61 (2001); *Davis* v. *School Dist. of Pontiac*, 95 F. Supp. 2d 688 (E.D. Mich. 2000); *Brown* v. *Board of Educ. of Topeka*, 671 F. Supp. 1290 (D. Kan.), *rev'd*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993).

[14] *See Liddell* v. *Special Sch. Dist. of St. Louis County*, 149 F.3d 862 (8th Cir. 1998); *Liddell* v. *Board of Educ. of St. Louis*, 121 F.3d 1201 (8th Cir. 1997); *Lockett* v. *Board of Educ. of Muscogee County Sch. Dist.*, 111 F.3d 839 (11th Cir. 1997) (en banc); *Coalition to Save Our Children* v. *State Bd. of Educ. of Delaware*, 90 F.3d 752 (3d Cir. 1996); *Lee* v. *Talladega County Bd. of Educ.*, 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993); *People Who Care* v. *Rockford Bd. of Educ., Sch. Dist. No. 205*, 2001 WL 755306 (N.D. Ill. June 29, 2001); *Pate* v. *School Bd. of Miami-Dade County*, No. 69-1020-CIV-DIMITROULEAS (S.D.

plainly have strong incentives to seek unitary status and the return of full local control.

Petitioners' alleged concern—about the danger of insulating "school boards from any fee exposure if they choose to cling to obsolete desegregation orders for the patently improper purpose of indefinitely perpetuating race-based student assignment plans"—is misplaced. Pet. 5. This hypothetical situation is not even present in *this* case: The *en banc* Fourth Circuit found no such facts to exist here. The decision below therefore provides no protection at all to school districts who take illegal actions. The Fourth Circuit's decision applies *only* to a school district, like CMS, whose remedial efforts are found to have been neither excessive nor inadequate, but effective to the extent practicable. In this context, the denial of attorney's fees not only is a logical application of settled law, but also poses no problem of policy or equity.

Fla. June 21, 2001); *Bradley* v. *Pinellas County Sch. Bd.*, No. 8:64-CV-98-T-23B (M.D. Fla. Aug. 10, 2000); *Blalock* v. *School Bd. of Lee County*, No. 64-168-CIV-FTM-23 (M.D. Fla. July 12, 1999); *NAACP* v. *Duval County Sch. Bd.*, No. 85-316-CIV-J-10C (M.D. Fla. May 27, 1999), *aff'd*, 273 F.3d 960 (11th Cir. 2001); *Reed* v. *Rhodes*, 1 F. Supp. 2d 705 (N.D. Ohio 1998), *aff'd*, 215 F.3d 1327 (6th Cir. 2000) (unpublished disposition); *Kelley* v. *Metropolitan Bd. of Educ.*, No. 3:55-2094/2956 (M.D. Tenn. Nov. 10, 1998); *United States* v. *Board of Sch. Comm'rs of Indianapolis*, No. IP 68-C-225 (S.D. Ind. June 25, 1998); *United States* v. *Board of Pub. Instruction of St. Lucie County*, 977 F. Supp. 1202 (S.D. Fla. 1997); *United States* v. *Unified Sch. Dist. No. 500, Kansas City*, 974 F. Supp. 1367 (D. Kan. 1997); *Mills* v. *Freeman*, 942 F. Supp. 1449 (N.D. Ga. 1996); *Keyes* v. *Congress of Hispanic Educators*, 902 F. Supp. 1274 (D. Colo. 1995), *appeal dismissed*, 119 F.3d 1437 (10th Cir. 1997); *United States* v. *Board of Educ. of Coffee County*, 1995 WL 224537 (S.D. Ga. Feb. 16, 1995); *Tasby* v. *Woolery*, 869 F. Supp. 454 (N.D. Tex. 1994); *Stell* v. *Board of Pub. Educ. for Savannah*, 860 F. Supp. 1563 (S.D. Ga. 1994); *Cisneros* v. *Corpus Christi Indep. Sch. Dist.*, No. 68-C-95 (S.D. Tex. July 29, 1992); *Dowell* v. *Board of Educ. of Okla. City Pub. Schs.*, 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd*, 8 F.3d 1501 (10th Cir. 1993).

Thus, even if this case presented a conflict among the circuits or a misapplication of federal law—and it does not—there would be no cause for the Court to devote its limited resources to resolving this unusual, fact-specific dispute.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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